INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	16

CITATIONS

Cases:

Airlift International, Inc. and the Slick Corp., Order #26933	8
American Airlines v. *Civil Aeronautics Board*, 348 F. 2d 349	10
Braniff-Mid-Continent Merger case, 17 C.A.B. 19	8, 12
Brotherhood of Locomotive Engineers v. *Chicago & North Western Railway Co.*, 314 F. 2d 424, certiorari denied, 375 U.S. 819	8, 11
Brotherhood of Railroad Trainmen v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30	11
Burlington Trunk Lines v. *United States*, 371 U.S. 156	13, 14
C. & S. Air Lines v. *Waterman S. S. Corp.*, 333 U.S. 103	10
Callanan Road Co. v. *United States*, 345 U.S. 507	9
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492	9
Kent v. *Civil Aeronautics Board*, 204 F. 2d 263 certiorari denied, 346 U.S. 826	7, 11, 12, 13

450-206—71

Cases—Continued

	Page
McGuire v. *Humble Oil and Refining Co.*, 355 F. 2d 352	14
New Orleans & Northeastern Railway Co. v. *Bozeman*, 312 F. 2d 264	8
Norfolk & Western Railway Co. v. *Nemitz*, No. 70–97, decided November 15, 1971	12, 15
Oling v. *Air Line Pilots Association*, 346 F. 2d 270, certiorari denied, 381 U.S. 926	15
Outland v. *C.A.B.*, 284 F. 2d 224	12
Steele v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192	13
United States v. *Lowden*, 308 U.S. 225	11, 16
Universal Airlines Company, Order No. 71–9–24 (September 3, 1971)	12
John Wiley & Sons v. *Livingston*, 376 U.S. 543	14
World Airways v. *Pan American World Airways, Inc., et al.* 391 U.S. 461	10

Statutes:

Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301 *et seq.*:	
Section 102	3
Section 408(b)	2, 10, 16
Section 414	2, 11
Section 801	10
Section 1006(a)	3, 9, 10, 15
Railway Labor Act, Sections 1a and 2 Fourth (44 Stat. 577, as amended, 45 U.S.C. 151a and 152 Fourth)	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-489

ALLIED PILOTS ASSOCIATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD

No. 71-550

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12–A22)[1] is reported at 445 F. 2d 891. The opinions of the Civil Aeronautics Board (Pet. App. A32–A40, A25–A31) are not yet reported.

---

[1] "Pet. App." references are to the appendix to the petition filed by the Allied Pilots Association in No. 71-489.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23–A24) was entered on July 23, 1971. The petition for a writ of certiorari in No. 71–489 was filed on October 5, 1971; and the petition in No. 71–550 was filed on October 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under Section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether an order of arbitration by the Board may bind an employee group which has actively participated in the Board proceedings leading to issuance of the order.

STATUTES INVOLVED

Section 414 of the Federal Aviation Act (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1384) provides:

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Sections 102, 408(b), and 1006(a) of the Federal Aviation Act of 1958 (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1302, 1378(b) and 1486(a)) are set forth at Pet. App. A1–A6. Sections 1a and 2 Fourth of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C 151a and 152 Fourth) are set forth at Pet. App. A7–A8.

STATEMENT

On January 22, 1970, petitioner American Airlines ("American"), together with Trans-Caribbean Airlines ("TCA"), applied to the Civil Aeronautics Board for approval of American's acquisition of TCA. After full hearings, the Board, by Order No. 70–12–161 (J.A. 24a–44a),[2] approved the proposed merger.

During the hearings, there emerged sharp differences between petitioner Allied Pilots Association ("APA"), which represented American's pilots, and the Master Executive Council ("TCA–MEC"), which represented TCA's pilots, over the labor aspects of the acquisition. The dispute concerned integration of seniority lists in the merged airline. TCA–MEC asked the Board to order binding arbitration of this pilots' dispute as a condition to approving the merger, or, alternatively, to resolve the dispute itself (J.A. 40a, n. 24). The Board denied these requests as premature. But, in its order of approval, it imposed labor protective provisions identical to those which it had regularly imposed for the past decade in merger and route-transfer cases (Pet. App. A13). Section 3 of

[2] "J.A." refers to the Joint Appendix in the court of appeals, which has been filed with the Clerk of this Court.

these provisions required fair and equitable integration of the seniority lists of both carriers, through negotiation where possible.[3] Section 13 provided that, should the parties be unable to agree, either side had the right to refer the disputed matter to binding arbitration.[4] See J.A. 40a, n. 24. Both petitioners fully accepted the Board-imposed conditions on the merger. Neither of the companies, none of the unions, nor any other person sought reconsideration of the Board's order or otherwise objected to it.

After the Board's approval of the merger, American met with APA and TCA–MEC. American and APA agreed that seniority lists should be integrated on a straight date-of-hire basis, and that furloughed pilots should be recalled on a last furloughed-first recalled basis (Pet. App. A14). TCA–MEC, however, considered these terms unfair to its men and de-

[3] Section 3 reads: "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

[4] Section 13 reads: "In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees."

manded that the matter be submitted to arbitration. When American and APA refused, TCA–MEC petitioned the Board on February 2, 1971, to order the parties to submit the issue of seniority-list integration to final and binding arbitration (Pet. App. A32–A33). American and APA opposed on the ground that their agreement was fair and equitable (Pet. App. A14).[5]

While this petition was pending, American and TCA consummated the merger on March 8, 1971. Pursuant to its agreement with APA, American then integrated the active pilots on a date-of-hire basis and planned to recall furloughed pilots on a last furloughed-first recalled basis (Pet. App A33).

Thereafter, the Board, by Order No. 71–5–30 issued on May 7, 1971 (Pet. App. A32–A40), granted TCA–MEC's request for an order directing American to submit the seniority-list integration issue to final and binding arbitration (Pet. App. A36). The Board noted that, while it customarily imposed labor protective conditions in merger cases, its well-established policy was to leave resolution of disagreements concerning those matters to negotiation among the carriers and employee groups, or, negotiation failing, to arbitration (Pet. App. A36–A37). The Board disclaimed any expertise in labor relations and held that "seniority is basically a matter for negotiation or arbitration" Pet. App. A37). It observed that TCA–

[5] American, while opposing the TCA–MEC petition, conceded the Board's authority to order binding arbitration of the issue (Pet. App. A36). APA denied the Board's authority (Pet. App. A35).

MEC's claims were not frivolous, created a *bona fide* dispute, and, under the labor protective conditions, entitled TCA–MEC to binding arbitration (Pet. App. A38).[6]

American, supported by APA, petitioned for reconsideration. Noting APA's assertion that no arbitration could affect its labor contracts with American, it claimed that arbitration was thus not feasible. The Board was asked to appoint a hearing examiner to determine whether the agreement that American had reached with APA provided a "fair and equitable method of seniority integration, and, if not, to prescribe the manner in which disputes concerning the method of integration should be resolved" (J.A. 206a, p. 1).

The Board, by Order No. 71–6–71 issued June 11, 1971 (Pet. App. A25–A31), denied reconsideration. It reiterated its preference for arbitration as a means of settling labor disputes, and it stated that there is no difference in the legal effect of ordering integration of seniority lists by arbitration or by the Board's own determination after hearings (Pet. App. A26). In either event, it pointed out (Pet. App. A26–A27),

[6] The Board specified that the order of the arbitration panel would bind all employees involved in the dispute (Pet. App. A40). To insure protection of the interests of all groups, the order gave all groups of pilots and flight engineers who desire to do so the right to participate in the arbitration; it also ordered that procedures be established to insure consideration of the interests of any employee groups that might choose not to participate (Pet. App. A39–A40). At the same time the Board denied TCA–MEC's request for interim relief blocking American's implementation of its integration plan (Pet. App. A38–A39).

any alteration of rights stemming from the American-APA collective bargaining agreement would be the result of the labor protective conditions, which are superior to any private contract. *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826.

On review, the court of appeals unanimously upheld the Board (Pet. App. A12–A22).

ARGUMENT

1. *a.* Both petitioners challenge the authority of the Board, as a condition of its approval of an airline merger, to order arbitration of a labor dispute at the behest of a labor group that does not represent a majority of the carrier's employees. Referring by analogy to the Railway Labor Act (45 U.S.C. 151a and 152 Fourth), which anticipates settlement of disputes without compulsory arbitration by negotiation between a carrier and the majority representative of the employees, they contend that the Board must be guided by similar principles in the present case (Pet. No. 71–489, pp. 14–17; Pet. No. 71–550, pp. 10–11). From this premise, petitioner APA apparently argues for a complete bar to an order of arbitration by the Board so long as the carrier and the bargaining agent of the larger of the constituent carriers can agree on a settlement (Pet. No. 71–489, pp. 16–17). Petitioner American, on the other hand, seems to take the position that the Board is required to examine all agreements between that carrier and bargaining agent; and it can order arbitration only

if it determines that their agreement is not fair and equitable (Pet. No. 71–550, pp. 10, 12).

These contentions attack only the legality of the arbitration provisions in Section 13 of the labor protective conditions; they come months after consummation of the merger pursuant to the terms of the Board's order of approval. Consequently, petitioners' arguments are untimely and are no longer available to them. In any event, they are insubstantial and do not warrant further review by this Court.

(1) In its order of approval (No. 70–12–161), the Board stated (J.A. 40a, n. 24): "After the issuance of our order establishing labor protective conditions, we expect that the pilot groups will, in accordance with the views expressed herein, abide by the labor conditions' contemplation that the rights of both pilot groups should be protected by negotiated integration of seniority lists in a 'fair and equitable manner,' and that, in the event of failure of agreement, the dispute will be submitted to arbitration."[7] The parties, including APA, were thus on notice of the intended meaning and force of the imposed conditions at the time that the merger was approved. As already noted, no party sought clarification or took exception by peti-

[7] This is consistent with the usual practice involving labor protective conditions under the Interstate Commerce Act. See, *e.g.*, *New Orleans & Northeastern Railway Co.* v. *Bozeman*, 312 F. 2d 264, 268 (C.A. 5); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Railway Co.*, 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819. Similarly, it conforms to earlier Board orders in related fields. See, *e.g.*, *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19; *Airlift International, Inc. and the Slick Corporation*, Order #–26933.

tioning for reconsideration. To the contrary, American proceeded promptly to consummate the merger and commenced operations over the routes formerly served by TCA. It is agreed that American and its pilots thereby acquired valuable benefits. They should not now be heard to complain of the labor protective conditions on the basis of which they were permitted to acquire these benefits. As this Court stated in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502:

> In 1951, the condition before us became an important factor in securing the Commission's finding that the merger would be in the public interest * * *. After the merger was approved on that condition, respondent sought no review of it. On the other hand, respondent consummated the merger and has enjoyed its benefit ever since. It cannot now be allowed to attack an officially approved condition of its merger while retaining at the same time all of its benefits.

Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)) requires a party who wishes judicial review of a Board order to file a review petition in a court of appeals within sixty days after the entry of such order. Here, however, petitioners waited almost six months before requesting review of the order of December 31, 1970, containing the labor protective conditions they now contest. As pointed out by the court below (Pet. App. A19), they are thus foreclosed by statute from raising the arguments in their petitions. *Callanan Road Co.* v. *United States*, 345 U.S.

507, 512.[8] To be sure Section 1006(a) does permit the late filing of a review petition upon reasonable grounds shown, but petitioners have made no such showing for their extraordinary delay.[9]

(2) At all events, petitioners' challenge to the Board's authority to order binding arbitration is without merit. The Board has broad power under Section 408 (b) of the Federal Aviation Act (49 U.S.C. 1378(b)) to approve airline mergers "upon such terms and con-

---

[8] Since the merger order had been approved by the President under Section 801 of the Federal Aviation Act (49 U.S.C. 1461), because it involved the transfer of foreign routes, it may well be that no review was available to petitioners under 49 U.S.C. 1486(a). See *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103. Even if petitioners could bring themselves within the exception to *Waterman*, however, on the ground that they are claiming that the Board order was *ultra vires* (see *World Airways* v. *Pan American World Airways, Inc., et al.*, 391 U.S. 461; *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349 (C.A.D.C.), the time within which they could raise that claim had long since expired when this suit was commenced (see 49 U.S.C. 1486(a)).

[9] Indeed, APA offers no excuse other than that in the statutory period for review of the order it did not believe that the Board had really given TCA–MEC the right to arbitration (Pet. No. 71–489, p. 25). But the Board's order was entirely clear on this point, and, as subsequent events proved, it meant just what it said. Petitioner American contends that to have timely challenged the labor protective provisions would have been inconvenient, for American would have had to challenge "the entire merger for which it sought Board approval" (Pet. No. 71–550, p. 17). But American, of course, could have challenged only that part of the order to which it objected. And it was American which sought approval of the merger to begin with: one of the reasonable burdens it must bear as an applicant is timely objection to any Board action concerning the merger which it thinks unlawful.

ditions as it shall find to be just and reasonable." As petitioner APA concedes (Pet. No. 71–489, p. 14), this empowers the Board to impose conditions to protect the employees of the merging carriers. *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826; *United States* v. *Lowden,* 308 U.S. 225. In the exercise of this power, the Board may prescribe compulsory arbitration as a means for resolution of labor disputes arising out of mergers, including disputes over seniority lists. See *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.,* 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819.

Nor is it precluded from doing so by the Railway Labor Act, which requires settlement of "major disputes" solely by voluntary procedures, but permits binding arbitration with respect to "minor disputes." See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 33. It is doubtful whether the dispute here over integration of seniority lists can be considered of "major" proportions within the parlance of that statute. Even assuming that it can, however, the proscription against submitting such disputes to binding arbitration under the Railway Labor Act has no application in this case. Section 414 of the Federal Aviation Act (49 U.S.C. 1384) explicitly relieves "[a]ny person affected by any order" from "all other restraints or prohibitions made by, or imposed under, authority of law * * *." See *Brotherhood of Locomotive Engineers* v. *Chicago &*

North Western Ry., supra; cf. *Norfolk and Western Railway Company* v. *Nemitz,* No. 70–97, decided November 15, 1971, slip op. p. 4.

Moreover, despite the fact that it had full power to resolve the present dispute over seniority lists (see *Kent* v. *Civil Aeronautics Board, supra*), the Board quite appropriately chose to remit the parties to the traditional labor procedures of negotiation and arbitration (see Pet. App. A20, A21). It was never contemplated that, in the exercise of its responsibilities to impose just and reasonable conditions, the Board would sit as a labor tribunal to adjudicate every labor dispute connected with a merger. Moreover, as the Board candidly admitted in this case, it possesses no special expertise in labor relations. See *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.).

Thus, its decision here was an eminently reasonable way of insuring that, following the merger, the dominant group would not unwarrantably subordinate the interests of the acquired carrier's employees, who are now a minority. *Braniff-Mid-Continent, supra,* 17 C.A.B. at 21–22.[10] Indeed, this concern with the rights

[10] This, of course, does not mean that "any minority, no matter how small" (Pet. No. 71–550, p. 11), could, by its failure to agree, force compulsory arbitration. Indeed, the Board has specifically declined to order arbitration of a dispute over seniority-list integration when requested by dissatisfied non-representative minorities. See *Universal Airlines Company,* Order No. 71–9–24 (September 3, 1971); cf. *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.). Rather, its concern is with the grievances of genuinely representative minority groups that result from the Board's approval of a merger.

of the minority employee-group is coincident with the policies underlying the Railway Labor Act (*Steele* v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192), and the pre-existing collective agreements between American and APA must yield to the paramount authority of the Board to effectuate a solution for the benefit of all employees affected by a merger. *Kent* v. *Civil Aeronautics Board, supra,* 204 F. 2d at 265–266.

Burlington Truck Lines v. *United States,* 371 U.S. 156, relied on by American (Pet. No. 71–550, p. 10), is not to the contrary. In that case, this Court set aside an order of the Interstate Commerce Commission, certifying a new trunkline carrier, on the ground that the Commission had not given adequate reasons to justify its grant of new authority instead of ordering the existing trunklines to handle all shipments. *Id.* at 167–168.[11] It noted that the Commission should consider the impact of its remedy upon national labor policy so as not to trench upon the jurisdiction of its sister agency, the National Labor Relations Board (*id.* at 173–174).

Here, by contrast, there is no problem of trespassing by the Civil Aeronautics Board upon the province of another agency expert in labor matters. The Board in fact deferred to the expertise of the National Mediation Board, stating that that agency was available to assist the parties in settling the dispute.

[11] The existing trunkline service was allegedly inadequate because of a labor dispute in which certain short-haul carriers became the target of a secondary boycott by the Teamsters Union. The National Labor Relations Board had found the boycott to be unlawful and had ordered that it terminate.

And, by leaving the seniority list dispute to negotiations and expert arbitration, the Board here, unlike the Commission in *Burlington*, avoided the danger of possibly contravening national labor palicy "because of lack of expert competence" (371 U.S. at 173).[12] Thus, as the court of appeals stated (Pet. App. A18): "If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make."[13]

---

[12] Contrary to the assertion of petitioner APA (Pet. No. 71–489, pp. 9–10), *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2), is not in conflict with the decision here. Neither company to the merger involved in *McGuire* was subject to the jurisdiction of the Civil Aeronautics Board, and Board approval under the special provisions of Section 408(b) was not required for the merger. That case thus has no application to the wholly different situation presented by the airline merger involved in this case. Cf. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543.

[13] To the extent petitioners argue that, aside from the general applicability of the policies underlying the Railway Labor Act, special circumstances in this case make the Board's order of arbitration arbitrary, that argument is equally unpersuasive. The Board properly found that there was a "bona fide dispute of a non-frivolous nature" (Pet. App. A38) which could not be resolved by negotiation to the satisfaction of the three parties. In such circumstances, it is the Board's general policy to provide for arbitration (see n. 7, *supra*), and it did so here. In view of the Board's lack of expertise in these labor matters and, as the court below stated, the "exaggerated" (Pet. App. A19) nature of American's fears about the conduct of the arbitration, it cannot be said that the Board acted unreasonably in ordering the dispute to bind arbitration.

b. Petitioners' challenge to the Board's authority to delegate to an arbitrator the responsibility of resolving the labor disputes involved here (Pet. No. 71–489, pp. 18–22; Pet. No. 71–550, pp. 13–18) is also essentially an attack on the legality of Section 13 of the labor protective provisions of Order No. 70–12–161. As such, it is out of time under 49 U.S.C. 1486(a). Unlike *Oling* v. *Air Line Pilots Association,* 346 F. 2d 270 (C.A. 7), certiorari denied, 381 U.S. 926, on which petitioner APA relies (Pet. No. 71–489, p. 25), this is not a later suit contesting the fairness of the arbitration proceedings that were ordered by the Board, or disputing the arbitrator's award.

In any event, the contention that the arbitration requirement amounts to a delegation of the Board's functions misconceives the nature of the Board's responsibility. That responsibility is to impose conditions upon mergers which are appropriate for the protection of employees, and thereafter in proper circumstances to order compliance with them.[14] These responsibilities have been fully discharged by the Board (cf. *Norfolk & Western Railway Co.* v. *Nemitz, supra*); petitioners' contention that the Board itself must integrate the seniority list is merely a variation of the central theme that arbitration is not a proper remedy.

2. Finally, the Board has the power to bind APA by its arbitration order. Admittedly, it has power to bind the carrier (Pet. No. 71–489, p. 26). It also has

[14] This latter responsibility is equally that of a court to which application may be made by an employee for enforcement of the condition.

the responsibility under Section 408(b) to see to it that there is a resolution of labor problems arising from mergers which it approves. Cf. *United States* v. *Lowden,* 308 U.S. 225. APA was an active participant in the Board proceedings that led to the arbitration order of May 7, 1971. As pointed out by the court of appeals (Pet. App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real."

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
Attorneys.

R. TENNEY JOHNSON,
General Counsel,
O. D. OZMENT,
Deputy General Counsel,
WARREN L. SHARFMAN,
Associate General Counsel,
ROBERT L. TOOMEY,
Attorney,
Civil Aeronautics Board.

NOVEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971.